

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

SEAN NICHOLAS COYLE,

Plaintiff,

No. CIV S-04-2309 LKK KJM P

vs.

CHARLOTTE HARRIS-WHITE, et al.,

Defendants.

ORDER

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Plaintiff is a state prisoner proceeding pro se with a civil rights action under 42 U.S.C. § 1983. Plaintiff has paid the filing fee.

Plaintiff's complaint states cognizable claims for relief based on 42 U.S.C. § 1983 and 28 U.S.C. § 1915A(b) against defendants Harris-White, Lane, Terri, Steber, Tillman, Goodman, Mitchell and Anderson.<sup>1</sup> If the allegations of the complaint are proven, plaintiff has a reasonable opportunity to prevail on the merits of claims against these defendants. The Clerk of the Court will be directed to issue the appropriate number of summonses to plaintiff for purposes of service of process. See Federal Rule of Civil Procedure 4.

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<sup>1</sup> Plaintiff's allegations against defendant Burgess fail to state a claim upon which relief can be granted. Plaintiff alleges Burgess threatened to use a tazer on plaintiff. Compl., Claim III at 10. However, mere threats generally do not amount to a violation of the Constitution. Gaut v. Sunn, 810 F.2d 923, 925 (9th Cir. 1987).

1 Plaintiff shall complete service of process in accordance with Federal Rule of  
2 Civil Procedure 4 within sixty days from the date of this order.<sup>2</sup> Plaintiff shall serve a copy of  
3 this order on each defendant together with a summons and a copy of the complaint. Within 120  
4 days from the date of this order, plaintiff and defendants shall each submit to the court and serve  
5 by mail on all other parties the following status report:

- 6 1. Whether this matter is ready for trial and, if not, why not;
- 7 2. Whether additional discovery is deemed necessary. If further discovery is  
8 deemed necessary, the party desiring it shall state the nature and scope of the discovery and  
9 provide an estimate of the time needed in which to complete it;
- 10 3. Whether a pretrial motion is contemplated. If any such motion is  
11 contemplated, the party intending to file it shall describe the type of motion and shall state the  
12 time needed to file the motion and to complete the time schedule set forth in Local Rule 78-  
13 230(m);
- 14 4. A narrative statement of the facts that will be offered by oral or documentary  
15 evidence at trial;
- 16 5. A list of all exhibits to be offered into evidence at the trial of the case;
- 17 6. A list of the names and addresses of all witnesses the party intends to call;
- 18 7. A summary of the anticipated testimony of any witnesses who are presently  
19 incarcerated;
- 20 8. The time estimated for trial;
- 21 9. Whether either party still requests trial by jury;
- 22 10. The potential for settlement and specific recommendations regarding  
23 settlement procedures and timing, including whether a settlement conference should be  
24 scheduled and if so when, and whether the parties will waive any conflicts with respect to the

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25 <sup>2</sup> Plaintiff is cautioned that this action may be dismissed if service of process is not  
26 accomplished within 120 days from the date the complaint was filed. See Fed. R. Civ. P. 4(m).

1 assigned Magistrate Judge convening a settlement conference; and

2 11. Any other matter, not covered above, which the party desires to call to the  
3 attention of the court.

4 In addition, plaintiff shall inform the court in his status report of the date and  
5 manner of service of process.

6 The parties are informed that they may, if all consent, have this case tried by a  
7 United States Magistrate Judge while preserving their right to appeal to the Circuit Court of  
8 Appeals. An appropriate form for consent to trial by a magistrate judge is attached. Any party  
9 choosing to consent may complete the form and return it to the clerk of this court. Neither the  
10 magistrate judge nor the district judge handling the case will be notified of the filing of a consent  
11 form unless all parties to the action have consented.

12 In accordance with the above, IT IS HEREBY ORDERED that:

13 1. The Clerk of the Court is directed to issue and send plaintiff eight summonses,  
14 for defendants Harris-White, Lane, Terri, Steber, Tillman, Goodman, Mitchell and Anderson.  
15 The Clerk shall also send plaintiff nine copies of the form "Consent to Proceed Before United  
16 States Magistrate Judge" with this order.

17 2. Plaintiff shall complete service of process on the defendants within sixty days  
18 from the date of this order. Plaintiff shall serve a copy of this order and a copy of the form  
19 "Consent to Proceed Before United States Magistrate Judge" on each defendant at the time the  
20 summons and complaint are served.

21 3. Defendants shall reply to the complaint within the time provided by the  
22 applicable provisions of Fed. R. Civ. P. 12(a).

23 4. Plaintiff's status report shall be filed within ninety days from the date of this  
24 order. Defendants' status report shall be filed within thirty days thereafter. The parties are  
25 advised that failure to file a status report in accordance with this order may result in the  
26 imposition of sanctions, including dismissal of the action and preclusion of issues or witnesses.

1           5. Unless otherwise ordered, all motions to dismiss, motions for summary  
2 judgment, motions concerning discovery, motions pursuant to Rules 7, 11, 12, 15, 41, 55, 56, 59  
3 and 60 of the Federal Rules of Civil Procedure, and motions pursuant to Local Rule 11-110 shall  
4 be briefed pursuant to Local Rule 78-230(m). Failure to oppose such a motion timely may be  
5 deemed a waiver of opposition to the motion. Opposition to all other motions need be filed only  
6 as directed by the court.

7           6. If plaintiff is released from prison at any time during the pendency of this case,  
8 any party may request application of other provisions of Local Rule 78-230 in lieu of Local Rule  
9 78-230(m). In the absence of a court order granting such a request, the provisions of Local Rule  
10 78-230(m) will govern all motions described in #5 above regardless of plaintiff's custodial status.  
11 See Local Rule 1-102(d).

12           7. Pursuant to Wyatt v. Terhune, 315 F.3d 1108, 1120 n.14 (9th Cir. 2003),  
13 plaintiff is advised of the following requirements for opposing a motion to dismiss for failure to  
14 exhaust administrative remedies made by defendant pursuant to non-enumerated Rule 12(b) of  
15 the Federal Rules of Civil Procedure. Such a motion is a request for dismissal of unexhausted  
16 claims without prejudice. The defendant may submit affidavits or declarations under penalty of  
17 perjury and admissible documentation to support the motion to dismiss. To oppose the motion,  
18 plaintiff may likewise file declarations under penalty of perjury and admissible documentation.  
19 Plaintiff may rely upon statements made under the penalty of perjury in the complaint if the  
20 complaint shows that plaintiff has personal knowledge of the matters stated and plaintiff calls to  
21 the court's attention those parts of the complaint upon which plaintiff relies. Plaintiff may serve  
22 and file one or more affidavits or declarations by other persons who have personal knowledge of  
23 relevant matters. Plaintiff may also rely upon written records, but plaintiff must prove that the  
24 records are what plaintiff claims they are. If plaintiff fails to contradict defendant's evidence  
25 with admissible evidence, the court may rely on the defendant's evidence. In the event both sides  
26 submit matters outside the pleadings, the court may look beyond the pleadings and decide

1 disputed issues of fact. If plaintiff does not serve and file a written opposition to the motion, the  
2 court may consider the failure to act as a waiver of opposition to the defendant's motion. If the  
3 defendant's motion to dismiss, whether opposed or unopposed, is granted, plaintiff's  
4 unexhausted claims will be dismissed without prejudice.

5 8. Pursuant to Rand v. Rowland, 154 F.3d 952, 957 (9th Cir. 1998) (en banc),  
6 cert. denied, 527 U.S. 1035 (1999), and Klinge v. Eikenberry, 849 F.2d 409 (9th Cir. 1988),  
7 plaintiff is advised of the following requirements for opposing a motion for summary judgment  
8 made by defendants pursuant to Rule 56 of the Federal Rules of Civil Procedure. Such a motion  
9 is a request for an order for judgment in favor of defendants without trial. A defendant's motion  
10 for summary judgment will set forth the facts that the defendants contend are not reasonably  
11 subject to dispute and that entitle the defendants to judgment. To oppose a motion for summary  
12 judgment, plaintiff must show proof of his or her claims. Plaintiff may do this in one or more of  
13 the following ways. Plaintiff may rely upon statements made under the penalty of perjury in the  
14 complaint if the complaint shows that plaintiff has personal knowledge of the matters stated and  
15 plaintiff calls to the court's attention those parts of the complaint upon which plaintiff relies.  
16 Plaintiff may serve and file one or more affidavits or declarations setting forth the facts that  
17 plaintiff believes prove plaintiff's claims; the person who signs an affidavit or declaration must  
18 have personal knowledge of the facts stated. Plaintiff may rely upon written records, but plaintiff  
19 must prove that the records are what plaintiff claims they are. Plaintiff may rely upon all or any  
20 part of the transcript of one or more depositions, answers to interrogatories, or admissions  
21 obtained in this proceeding. If plaintiff fails to contradict the defendants' evidence with  
22 counteraffidavits or other admissible evidence, the defendants' evidence may be taken as the  
23 truth and the defendants' motion for summary judgment granted. If there is some good reason  
24 why such facts are not available to plaintiff when required to oppose a motion for summary  
25 judgment, the court will consider a request to postpone considering the defendants' motion. If  
26 plaintiff does not serve and file a written opposition to the motion or a request to postpone

1 consideration of the motion, the court may consider the failure to act as a waiver of opposition to  
2 the defendants' motion. If the defendants' motion for summary judgment, whether opposed or  
3 unopposed, is granted, judgment will be entered for the defendants without a trial and the case  
4 will be closed.

5 9. A motion or opposition supported by unsigned affidavits or declarations will  
6 be stricken.

7 10. Each party shall keep the court informed of a current address at all times  
8 while the action is pending. Any change of address must be reported promptly to the court in a  
9 separate document captioned for this case and entitled "Notice of Change of Address." A notice  
10 of change of address must be properly served on other parties. Pursuant to Local Rule 83-182(f),  
11 service of documents at the record address of a party is fully effective. Failure to inform the  
12 court of a change of address may result in the imposition of sanctions including dismissal of the  
13 action.

14 11. The Clerk of the Court shall serve upon plaintiff a copy of the Local Rules of  
15 Court.

16 12. The failure of any party to comply with this order, the Federal Rules of Civil  
17 Procedure, or the Local Rules of Court may result in the imposition of sanctions including, but  
18 not limited to, dismissal of the action or entry of default. Fed. R. Civ. P. 11; Local Rule 11-110.

19 DATED: April 4, 2006.

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22 UNITED STATES MAGISTRATE JUDGE  
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